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No. \_\_\_\_\_ OFFICE OF THE CLERK

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In The  
SUPREME COURT OF THE UNITED STATES

October Term, 1995

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LAURINA PRICE,

Petitioner,

vs.

S-B POWER TOOL, also known as  
Skil Corporation, a division  
of Emerson Electric Company,

Respondents.

Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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LARRY J. STEELE  
Attorney for Petitioner  
P.O. Box 561  
Walnut Ridge, AR 72476  
(501) 886-5840

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**QUESTION PRESENTED FOR REVIEW**

Certiorari should be granted to determine whether the lower court erred in granting respondent's motion for summary judgment, holding that petitioner, former employee, failed to demonstrate genuine issue of material fact as to whether former employer's explanation, excessive absence, was pretext for discrimination (discharge).

# **PARTIES TO THE PROCEEDING**

Petitioner, Laurina Price, is a resident of Powhatan, Lawrence County, Arkansas. She was the plaintiff in the lower court proceedings of this case and was the appellant before the United States Court of Appeals for the Eighth Circuit.

Respondent, S-B Power Tool, also known as Skil, is a corporation partially owned by Emerson Co., existing by virtue of the laws of the State of Missouri, qualified to do business in the State of Arkansas. Respondent has manufacturing facilities in Walnut Ridge, Lawrence County, Arkansas, and was a defendant to the action in the lower court proceedings. S-B Power Tool, was also an appellee before the United States Court of Appeals for the Eighth Circuit.

There are no other parties to this action.

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**OPINIONS BELOW**

On January 30, 1996, the United States Court of Appeals for the Eighth Circuit issued its opinion, affirming the decision of the United States District Court for the Eastern District of Arkansas.

### STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Eighth Circuit and its judgment of January 30, 1996. That judgment affirmed the lower court's grant of summary disposition. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

### STATUTE INVOLVED

Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. The ADA prohibits discrimination against "qualified individuals with disabilities." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is defined at 42 U.S.C. § 12111(a) as:

An individual with a disability who, with or without "reasonable accommodation," can perform the "essential functions" of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of the job are essential, and if an employer has prepared a written description for advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

### STATEMENT OF THE CASE

Petitioner, Laurina Price, became employed by Skil immediately after graduating from high school in 1984 and has had no other employment.

Skil manufactures hand held power tools, and employs between four and five hundred people.

Price remained continuously employed as an assembler, with the exception of a short period of time when she was classified as a line inspector, and worked in packing until her discharge on April 19, 1993.

Price notified Skil that she had epilepsy when she applied for employment at Skil.

Skil kept a medical file on employees separate from their personnel file.

In February of 1986, pursuant to a report from Dr. Gary Goza, Skil was informed that Price had clearly abnormal EEGs, showing epileptic discharges with some focality to the discharges, with the most prominent discharges being in the left temporal and frontal areas.

Skil maintains a policy concerning absences which applies to all of its hourly employees. A job absence, which is counted against an employee, is defined by Skil as any unscheduled absence.

Skil's policy toward an employee whose absent rate rises past three percent was subject to disciplinary actions up to and 5

including discharge.

Skil's policy in determining the absentee rate percentage was to divide the number of job absences by the number of days worked.

Skil's policy was to compute the rate of absences accumulated on a rolling twelve-month period. For each new month added to the computation, an old month was dropped from the rolling period.

The definition of "job absence" does not include approved leaves of absence or absences of less than a full day.

Skil has a practice of granting leaves of absence, including medical leaves of absence, to any employee who requests such a leave.

Leaves of absence do not count against an employee and are not considered in computing the three percent rate.

During Price's tenure, she requested and received several leaves of absence related to her pregnancy which were excused.

It was Skil's policy that if an employee got sick over the weekend and saw a doctor that weekend or Monday and got a doctor's excuse, the employee was allowed to miss Monday and Tuesday and count the leave as three days (an excused absence which would not be counted toward the employee's rate of absence).

From the beginning of Price's employment in 1984, Price would occasionally have

problems with attendance, acquiring, at times, an absence rate of up to 7%. This computes to less than two days a month or 1.4 days for every 20 days worked.

Defendant had made accommodations for Price for the first six (6) years of Price's employment by occasionally giving Price either verbal or written warnings, but never terminating Price, even though her absentee rate rose over 3%.

The ownership of the defendant partially changed in 1992. Coinciding with the partial change of ownership and the new information concerning Price's EEGs, reminding Skil of Price's disability, an apparent change in policy was directed toward Price.

On January 12, 1993, Price missed her tenth day of work for the prior 12-month period and her absentee rate went up from 3.7% to 4.6%.

Two of these absences were because Price was taking care of her sick infant, and one absence was for Price to attend the funeral of a close relative, which Skil did not excuse.

Price was absent on April 13 and 14, 1993, because of stomach cramps and diarrhea for which Price provided medical documentation. Even though Price provided timely medical documentation, Skil counted these two absences against Price. Price contends that her stomach problems were related to stress created by her employer by moving her from one assigned task to another and being told that "if you do not learn this job in five (5) minutes, you will be out the door."

Price contends that on April 19, 1993, she provided Larry Evans, her immediate supervisor, with documentation of her medical care and doctor's appointment with Dr. Ragland for April 13 and 14, 1993.

On April 19, 1993, respondent discharged Price, alleging that she had accumulated 12 absences during the rolling 12-month period.

Price was viewed by her immediate supervisor, Larry Evans, as an average worker who had no problem with her on the job. It was Larry Evans' opinion that Price was qualified to do what she had been assigned.

Price was given ratings of "above average" on knowledge and attitude by her supervisors.

It was Larry Evans' opinion that the epilepsy was not a problem with Price's work while she was at Skil. In fact, the lower court found that except for the alleged absences, Price was a qualified individual with a disability, epilepsy. (Addendum 25a)

The respondent admits that Price could do her work except for her absences.

The respondent does not argue the direct threat defense.

The decision to terminate Price was made by Larry Evans after meeting with human resource personnel and the operation manager for Skil.

When the decision to terminate Price

was made, Larry Evans was aware that Price had medical problems and that it was rumored to be epilepsy.

Price is compared to two women with similar attendance problems, who were not terminated, Vicki Collins and Betty Brandon.

Vicki Collins and Betty Brandon were not terminated, but were receiving warnings when their absentee rate rose to 5% and 6.6% respectively.

The district court found that the uncontroverted evidence was that Brandon and Collins quit before ever being terminated. In fact, Collins continued to work six more months after receiving her last warning.

Petitioner filed a complaint alleging a violation of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., for intentional discrimination based on her discharge.

The lower court granted summary judgment to the respondent, holding that plaintiff failed to establish a prima facie case of discrimination under the ADA.

The lower court further held that even if the court were to assume that petitioner had made a prima facie case, respondent has met its burden of production by providing evidence to sustain a judgment in its favor. The lower court further found that petitioner had not established the existence of facts which would permit a jury to conclude that respondent's proffered reason was pretextual or that intentional discrimination was the true reason for respondent's

actions. See, *Krenik v. County of LeSueur*, \_\_\_\_\_ F.3d \_\_\_\_\_, 1995 WL 54783 (8th Cir. 1995).

Petitioner filed a motion to reconsider, arguing that the issue of attendance requirements necessary to perform her job is a fact intensive determination to be addressed by the jury. *EEOC v. A.I.C. Securities Investigations Ltd.*, 820 F.Supp. 1060, 2AD Cases 561 (N.D. Ill., 1993), which was also denied by the lower court.

The Court of Appeals for the Eighth Circuit affirmed the holding of the lower court on January 30, 1996.

Petitioner now seeks the review of this Court.

#### REASON FOR GRANTING THE WRIT

**CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE LOWER COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, HOLDING THAT PETITIONER, FORMER EMPLOYEE, FAILED TO DEMONSTRATE GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER FORMER EMPLOYER'S EXPLANATION, EXCESSIVE ABSENCE, WAS PRETEXT FOR DISCRIMINATION (DISCHARGE).**

The analysis of petitioner's claim is governed by *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). By a preponderance of the evidence, the petitioner must prove that she belonged to a protected class, that she was qualified for the job, that she suffered an adverse employment action, and that she was treated differently from similarly situated employees.

For purposes of the order, the district court found that petitioner had a disability, epilepsy. The lower court also found that it was undisputed that the petitioner could perform her job on the line with the only issue being her attendance. It is undisputed that the petitioner suffered an adverse employment action by being discharged.

The petitioner contends that she was treated differently from similarly situated employees without disabilities, namely Brandon and Collins. Brandon and Collins were allowed to continue their employment until they quit voluntarily, having an absentee rate of 5% and 6.6% respectively.

Price was written a warning when her absentee went up from 3.7% to 4.6%, and discharged following her two absences because of her documented stomach problems. The counting of the two days absence because of her stomach problems were against the employer's stated rules in computing absences. Two days, which were used to calculate the 4.6% absence rate, were for attending a relative's funeral and taking her infant to the doctor.

Skil, against its own policy, counted two excusable medical leave days against Price, and two days when Price was out for a funeral of a close relative and to take her infant son to the doctor.

Skil's reason for terminating Price is merely contrived and is pretextual.

The Supreme Court on June 25, 1993, published its opinion in *St. Mary's Honor*

*Center v. Hicks*, 62 FEP Cases 96 (1993). In *St. Mary's Honor Center*, *supra*, the court stated:

"Under *McDonnell Douglas* scheme applicable to Title VII discriminator treatment cases, court must award judgment to plaintiff as matter of law at close of defendant's case if, on evidence presented, any rational person would have to find existence of facts constituting *prima facie* case of discrimination, and defendant has failed to introduce evidence which, taken as true, would permit conclusion that there was nondiscriminatory reason for adverse action."

When Price's treatment by Skil, discharge, is compared to the mere warnings given to Brandon and Collins, for having nearly identical absence rates, one can only conclude Price has made her *prima facie* case.

Admittedly, if an employer can articulate in a motion for summary judgment nondiscriminatory reasons for the action taken, and the petitioner cannot produce direct evidence of intentional discrimination, then the petitioner will be in a more difficult position to withstand the motion. Petitioner's direct evidence of discrimina-

tion is the disparate treatment concerning the rate of absences of petitioner when compared to Brandon and Collins. Petitioner was discharged, and Brandon and Collins were not, even though their rate of absences were equal to or greater than petitioner's. The respondent violated its own rules of calculating rate of absences.

The new burdens of proof under *St. Mary's Honor Center* with respect to pretext really are just a clarification by the Supreme Court. The petitioner still retains the burden to prove that discrimination, intentional discrimination, was the reason for the adverse employment action taken.

The discriminatory practices of Skil began approximately six (6) years after Price's initial employment and approximately the same time the ownership of Skil partially changed. This change in attitude of Skil toward Price is assumed to be as a result of the change in the nature of the ownership. In fact, Price was terminated at a time that her rate of unexcused absences was lower than it had been in previous years. Obviously, Skil had made accommodations for Price in the past which it stated it could no longer do. The past accommodations made by Skil are evidence that the stated reason of excessive absence is merely pretextual.

Price submits that her stomach problems were a direct result of the pressure put on her by her employer in a covert effort to secure Price's resignation. This was carried on by moving Price from one assigned task to another and being told that "if you do not learn this job in five (5) minutes,

you will be out the door."

Under the *McDonnell Douglas* framework, as interpreted by the Supreme Court in *St. Mary's Honor Center*, Price has proven by a preponderance of the evidence that she belonged to a protected class, that she was qualified for her job, that she suffered an adverse employment action, and that she was treated differently from similar similarly situated employees. Thus, Price has carried her initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

Price requested an accommodation by submitting a copy of her medical care and doctor's appointment for April 13 and 14, 1993 which defendant Skill ignored.

In *O'Connor v. Consolidated Coin Caterers Corp.*, No. 95-354, decided April 1, 1996, this Court reaffirmed the *McDonnell Douglas/Burdine* burden-shifting analysis developed in context of Title VII.

The Court in *O'Connor* stated that proof in employment discrimination action that defendant's articulated explanation for employment action is false or incorrect does not, standing alone, entitle plaintiff to judgment; rather, showing must be that explanation is pretext for discrimination.

In the case at bar, petitioner had successfully held her position with the respondent for six (6) years with their knowledge of her disability, epilepsy, because of their accommodation of her slight absentee rate above respondent's stated 3%.

With a change of owners, and the new medical information, the respondent no longer accommodated petitioner as in the past, thus, its stated reason for discharge must be viewed as pretextual.

On motion for summary judgment, the court must view evidence provided in light most favorable to nonmoving party to determine whether that evidence creates genuine issue for trial. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

The lower courts, the district court and the Eighth Circuit, both speculated that Collins and Brandon would be terminated by the respondent. A decision by a court should not be based on mere speculation or assumptions. Respondent's stated reason for dismissal of petitioner must be viewed as pretextual.

**CONCLUSION**

One would have to conclude that the lower courts erred in their application of the law in order to reach the conclusion that petitioner, Laurina Price, failed to establish a prima facie case.

For the above reasons, this Court should reverse the lower courts' decisions granting and affirming summary judgment for the respondent.

Respectfully submitted,

*Larry J. Steele*

LARRY J. STEELE  
Attorney for Petitioner  
P.O. Box 561  
Walnut Ridge, AR 72476  
(501) 886-5840

**APPENDIX A - OPINION OF THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT  
FILED JANUARY 30, 1996**

No. 95-2075

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

LAURINA PRICE,

Plaintiff/Appellant,

v.

S-B POWER TOOL, also known as  
Skil Corporation, a division  
of Emerson Electric Company,

Defendant/Appellee.

ON APPEAL from the United States District  
Court for the Eastern District of Arkansas

Submitted December 15, 1995  
Filed January 30, 1996

Before: MAGILL, BRIGHT, and MURPHY,  
Circuit Judges.

MURPHY, Circuit Judge.

Laurina Price appeals from a judgment dismissing her employment discrimination claim brought under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 - 12213, and from the denial of her

motion for reconsideration.<sup>1</sup> Her complaint alleged that S-B Power Tool (Skil)<sup>2</sup> terminated her employment because she suffers from epilepsy. The district court<sup>3</sup> granted summary judgment to Skil after determining that Price had failed to establish a prima facie case and had not shown that Skil's proffered legitimate nondiscriminatory reason was pretextual. We affirm.

The background facts are not in dispute. In 1984 Price was hired as an assembler by Skil, which manufactures hand held power tools. She continued working at that job for more than eight years, except for a brief period of time when she was classified as a line inspector. The record indicates that Price suffers from epilepsy or a seizure disorder and that Skil was aware of her condition. Skil does not dispute that Price was able to perform her assembly job well on the days that she reported to work.

Price had attendance problems throughout her employment at Skil and had received

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<sup>1</sup>On appeal, Price has not presented any specific argument related to the denial of this motion.

<sup>2</sup>Skil is incorrectly identified in the caption as a division of Emerson Electric Company. (Emerson). In fact, Skil is a partially owned by Emerson.

<sup>3</sup>The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

a number of verbal and written warnings as a result. She was discharged on April 19, 1993, after failing to report to work on April 12 and 13 after she had been given formal written warnings on March 1 and January 11. At the time of her termination she was informed that the reason for the action was her excessive absences.

Skil's attendance policy requires that an employee's absentee rate not exceed three percent. Generally, an employee who violates the policy receives a verbal warning for the first offense, a written warning for the second offense, and termination for the third offense, but the policy provides that discharge is permissible after an initial verbal warning.

Skil determines an employee's absentee rate by dividing the number of unscheduled job absences by the number of days worked in a rolling twelve month period. The calculation does not include long term absences after the first four days, declared bad weather days, scheduled absence for vacation, scheduled absence for holidays, approved leaves of absence, or absences of less than a full day.

Skil has a practice of granting leaves of absence, including medical leaves of absence, to any employee who requests them. Skil had encouraged Price to take leaves of absence when necessary and had never denied her request for one. Price was aware of this policy and had taken leaves of absence for medical, personal, and pregnancy reasons. During the year prior to her dismissal, she took maternity leave from November 11, 1991 to June 28, 1992, personal

leave unrelated to her epilepsy from September 16 to 21, 1992, and medical leave (presumably for her epilepsy) from October 6 to 27, 1992 and from November 30, 1992 to January 4, 1993. These approved leaves were not counted against her in the calculation of her absentee rate. The plant was also shut down several times during the year prior to her termination: June 39 to July 10, October 1 to 2, November 23 to 27, December 28, 1992 to January 4, 1993, January 20 to 29, February 15 to 26, and March 22 to 26, 1993.

During the twelve month period before her termination, Price's attendance record was poor and she received a series of warnings. After her return from a seven month pregnancy leave, and not counting scheduled absences, she was absent from work without approval on July 30, August 11, August 24, August 25, and September 11. At this point her absentee rate exceeded three percent, and Price was given a verbal warning. After she missed work on November 9 and 16, 1992, she was given another verbal warning about her attendance. In spite of the verbal warnings, Price missed work on January 11, 1993, raising her absentee rate from 3.7 percent to 4.6 percent. At that time she was issued a written warning that her attendance level was unacceptable. She missed another day of work on February 1, 1993, and a second written warning was issued on March 1, warning her that she would be terminated if her absenteeism rate did not fall below three percent.

At the time of the second written warning on March 1, Price's supervisor instructed her to call in to arrange for a

leave of absence if she was going to miss any more days because she would be terminated unless her absenteeism rate decreased. The next month Price failed to report to work on April 13 and 14, 1993, and she did not contact her supervisor to arrange for a leave of absence. She was terminated shortly thereafter.

Many of Price's absences were not attributable to her seizure disorder. For example, her absences on April 13 and 14 were caused by stomach cramps unrelated to her disability.<sup>4</sup> Price concedes that at least two of the remaining ten absences were for care of her infant and one was for attending a funeral. Presumably the remaining absences were related to her epilepsy.

On appeal Price claims that summary judgment was inappropriate because there was sufficient evidence to establish a prima facie case of employment discrimination and create an issue of fact whether Skil's claim that she was fired for absenteeism was pretext.

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). All evidence and inferences must be viewed in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The non-moving party, however, may not rest upon

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<sup>4</sup>Although Price asserts that her stomach problems arose from pressures at work, she does not claim that she was pressured because of her epilepsy.

mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). We review a grant of summary judgment de novo. Crawford v. Runyon, 37 F.3d 1338, 1340 (8th Cir. 1994).

The ADA prohibits employment discrimination "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). A plaintiff may use the burden-shifting framework identified in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993), to prove a claim of intentional discrimination. This method of proof requires a plaintiff to establish her ability to prove a prima facie case. In the absence of an explanation from the employer, this creates a rebuttable presumption of discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). The burden of production then shifts to the employer to come forward with a legitimate, nondiscriminatory reason for its actions. Id. Finally, the burden shifts back to the plaintiff to prove that the defendant's proffered reason is pretextual and that intentional discrimination was the true reason for the defendant's actions. See Hicks, 113 S.Ct. at 2747.

To establish a prima facie case under the ADA, a plaintiff must show that she is a disabled person within the meaning of the ADA, that she is qualified to perform the essential functions of the job (either with or without reasonable accommodation), and that she has suffered an adverse employment

action under circumstances from which an inference of unlawful discrimination arises. Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995); Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir. 1995); Johnson v. Legal Services of Arkansas, Inc., 813 F.2d 893, 896 (8th Cir. 1987) (Rehabilitation Act of 1973). An inference of discrimination may be raised by evidence that a plaintiff was replaced by or treated less favorably than similarly situated employees who are not in the plaintiff's protected class.<sup>5</sup> Johnson, 813 F.2d at 896.

Price did not meet her burden of establishing a prima facie case because the record does not show that Price's termination occurred under circumstances that would permit an inference of discrimination.<sup>6</sup> Price has not presented any facts tending to suggest that she was terminated because of her disability. She asserts that she was treated differently from other similarly

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<sup>5</sup>Although our court has not modified the typical burden-shifting framework to fit disability cases, the Fourth Circuit has held that other types of evidence may also create an inference of discrimination in these cases since it may not always be possible to determine whether another employee is a member of the protected class. See Ennis v. National Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58-59 (4th Cir. 1995). But see Daigle v. Liberty Life Ins. Co., 70 F.3d 394, 396 (5th Cir. 1995).

<sup>6</sup>Skil also claims that Price was not a "qualified individual" under the ADA because regular attendance was an essential function of her job. Because there is insufficient evidence to suggest that Price was dismissed because of her epilepsy,

situated nondisabled employees, but her claim is not supported by her own evidence. She identifies two non-disabled employees with similar attendance problems, but does not show that they were treated any differently. Both had received oral and written warnings in response to their attendance rates rising above three percent. Neither was actually terminated, but that was because both quit voluntarily soon after receiving the written warning.

The evidence in the record, when viewed in a light most favorable to Price, shows only that she was terminated for being absent from work on April 12 and 13 without calling to arrange for leave time after being instructed specifically to do so. Her absences on those days were not related to her epilepsy, and she does not claim that her epilepsy prevented her from calling in to make arrangements for leave time. Her supervisor had warned her in March that she must call in to arrange for leave time if she was going to be absent for any reason. The record is insufficient to create a prima facie case of discrimination.

Summary judgment would have been appropriate even if Price had established a prima facie case of discrimination because Skil offered a legitimate nondiscriminatory reason for her dismissal and Price failed to come forward with any evidence of pretext. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2747 (1993). Skil asserted that Price was dismissed because she had violated the company's attendance policy and that enforcement of the attendance policy was necessary because of the nature of the work; each person on the assembly line is assigned

certain duties to perform and without advance notice of absences it is difficult to obtain a replacement worker, particularly one with the necessary skills. Price has not shown the existence of any facts which would permit a jury to conclude that this reason was pretextual or that intentional discrimination was the true reason for her termination. See Krenick v. County of LeSueur, 47 F.3d 953, 958 (8th Cir. 1995) (ADEA).

Price claims that there is evidence in the record to suggest that Skil's asserted reasons were pretextual, but she relies primarily on speculation to support her claim. She suggests that Skil may have been influenced by her many leaves of absence because it has acknowledged that they created some burden on the company. It is undisputed, however, that leaves of absences were excused and encouraged by Skil and were not counted against her in the calculation of her absentee rate.

Price also suggests that after the company's ownership partially changed in 1992, Skil changed its attitude toward her because of her epilepsy. She asserts that until 1992 Skil had accommodated her disability by not firing her even though she had poor attendance, but that after 1992 it refused to accommodate her by ultimately firing her. The evidence shows that Price had received numerous warnings about her excessive absenteeism throughout her employment with the company, however. Price points to no evidence to suggest that she ever asked for an accommodation or that the new partial owner had discriminatory motives or even influenced the decision to terminate her.

Finally, Price says that Skil fired her even though her absences on April 13 and 14 should not have been counted against her absentee rate. She argues that the two days should have been converted to excused absences when she provided Skil with a doctor's note confirming her stomach disorder. She does not dispute that she had been specifically instructed to call her supervisor if she was going to be absent, however, or that the record shows no attempt by her to notify the company that she would be absent at the time of her illness. She did not provide the note from her doctor until April 19, 1993, the day that she was terminated. Price has not met her burden of showing that Skil's reason for terminating her was pretextual.

After a careful examination of the record we conclude that the district court did not err in granting summary judgment in favor of Skil. Price failed to present a prima facie case of discrimination and, even if she had done so, she failed to come forward with evidence that Skil's proffered legitimate nondiscriminatory reason was a pretext.

For these reasons the judgment of the district court and its order denying reconsideration are affirmed.

A true copy

Attest:

CLERK, U.S. COURT OF APPEALS,  
EIGHTH CIRCUIT.

**APPENDIX B - JUDGMENT OF THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT  
DATED JANUARY 30, 1996**

January 30, 1996

Mr. Larry Joe Steele  
P.O. Box 561  
115 S.W. Second Street  
Walnut Ridge, AR 72476

Re: 95-2075EAJ  
Laurina Price vs. S-B Power Tool

Dear Counsel:

Enclosed is a copy of the opinion filed today in the referenced case. Judgment in accordance with the opinion is also entered today.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and suggestions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of the judgment. No grace period for mailing is allowed, and the date of the postmark is irrelevant. Any petition for rehearing or suggestion for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

12a

Sincerely,

s/ Michael E. Gans /  
Michael E. Gans  
Clerk of Court

mam

Enclosure(s)

cc: Russell Allen Gunter  
Robin L. Shively  
Jim McCormack

District Court/Agency Case Number(s):  
J-C-94-190

13a

**APPENDIX C - ORDER OF THE  
UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
DATED AND FILED MARCH 31, 1995**

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
JONESBORO DIVISION

LAURINA PRICE

PLAINTIFF

v. Civil No. J-C-94-190

S-B POWER TOOL  
(SKIL CORPORATION)

DEFENDANT

ORDER

Pending before the Court is defendant's March 13th motion for summary judgment supported by brief, exhibits, affidavits, and a separate statement of undisputed facts. Plaintiff responded on March 20th with brief, exhibits, affidavit and statements of undisputed and disputed facts. Defendant filed a reply on March 29th. Plaintiff filed a supplemental response on March 30th.

Summary judgment can properly be entered when there are no genuine material facts that can be resolved by a finder of fact; that is, there are no facts which could reasonably be resolved in favor of either party. The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2512 (1986). The non-moving party may not just

rest upon his or her pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986); Civil Procedure Rule 56. The mere existence of a factual dispute is insufficient alone to bar summary judgment; rather the dispute must be outcome determinative under prevailing law." Holloway v. Pigman, 884 F.2d 365, 366 (8th Cir. 1989).

Based on the factual statements of the parties and the proof presented by the parties, the Court finds the following facts to be undisputed by the record:

1. Defendant (Skil) is not a division of Emerson, but rather is partially owned by Emerson. The partial change in ownership occurred in 1992. However, the personnel policies and employees who worked at Skil remained the same.

2. The plaintiff (Price) was hired on or about June 18, 1984, at Skil's manufacturing facility in Walnut Ridge, Arkansas.

3. Skil manufactures hand held power tools and employs between four and five hundred people. Medical files on employees are kept separate from their personnel files.

4. Price became employed by Skil immediately after graduating from high school in 1984 and has had no other employment.

5. Price remained continuously employed as an assembler, with the exception

of a short period of time when she was classified as line inspector and worked in packing.

6. Skil was informed in 1986 by a February 25, 1986 letter of Dr. Gary R. Goza that Price had clearly abnormal EEGs showing epileptic discharges with some focality to the discharges with the most prominent discharges being in the left temporal and frontal areas.

7. During much of Price's employment and at the time of her employment, Price's supervisor was Larry Evans, Unit Manager.

8. Price was viewed by Evans as an average worker and with whom he had no problem with her on the job. Evans believed that Price was qualified to do what she had been assigned.

9. Price was given ratings of "above average" on knowledge and attitude by her supervisors. Her rating of dependability was "outstanding" for the last part of 1984 through the first part of 1985, slipped to "average" from the last of 1985 through 1987, and was "below average" until her termination.

10. Evans was aware that Price had medical problems and that it was rumored to be epilepsy. His opinion was that epilepsy was not a problem with Price's work while she was at Skil.

11. Epilepsy or a seizure disorder is the only disability Price believes she has. Normally, when Price has an epileptic attack, she gets dizzy, passes out, and has

a seizure. Price's seizures come on without any notice or warning. When Price regains consciousness after the seizures, she is so weak that she cannot do anything for the rest of the day. The seizures normally last about 5 to 10 minutes.

12. Skil has an attendance policy which applies to all of its hourly employees. The policy provides that an employee's absentee rate may not exceed three percent (3%). Pursuant to the policy, employees whose absentee rate exceeds three percent are subject to discipline. The discipline ranges from a verbal warning to termination. Generally, an employee may receive a verbal warning for the first offense, a written warning for the second offense, and termination for the third offense. However, the policy clearly provides that "an employee whose absence rate rises after receiving the 3% verbal counseling will be subject to further disciplinary actions up to and including discharge."

13. The absentee rate percentage is determined by dividing the number of job absences by the number of days worked.

14. The rate of absences is accumulated on a rolling twelve-month period. For each new month added to the computation, an old month is dropped from the rolling period. Evans did not compute absences.

15. A job absence which is counted against an employee is defined by Skil as an unscheduled absence. However, the definition of "job absence" does not include long term absences after the first four

days, declared bad weather days, scheduled absence for vacation, scheduled absence for holidays, approved leaves of absence or absences of less than a full day. Job absences, as defined above, are calculated in determining the job absence rate.

16. Supervisors receive a monthly job absence rate report which lists all factory hourly individuals whose absence rate was over three percent for the reporting period (which is ordinarily the previous month). Employees whose absence rate is above three percent and is increasing are also noted.

17. Skil has a practice of granting leaves of absence, including medical leaves of absence, to any employee who requests such a leave. Technically, in order to take a leave of absence, an employee must be off work for three days. However, in an attempt to liberally apply the leave policy and give employees the benefits of the doubt, Skil would in some instances allow days other than work days to count toward the three-day leave. For instance, employees were allowed to start leave on Thursday and return on Monday and count the leave of absence as four days even though the employee only missed two work days. Also, if an employee got sick over the weekend and saw a doctor that weekend or Monday and got a doctor's excuse, the employee was allowed to miss Monday and Tuesday and count the leave as three days.

18. Price understood and it was common knowledge among employees that there was a Skil policy that an employee whose absence rate exceeded three percent was subject to discipline, up to termination.

19. During her employment, Price took leaves of absence for medical, personal, and pregnancy reasons and was aware of the procedure for requesting a leave of absence.

20. During her employment, Skil encouraged Price to take leaves of absence when she needed to, and Price was given leaves of absences whenever she requested them.

21. Leaves of absence do not count against an employee and are not considered in computing the three percent rate.

22. Price began developing an attendance. Since approximately 1987, Price's attendance was, for the most part, unacceptable, and on several occasions exceeded three percent.

23. Price received several verbal and written warnings as the result of her absences prior to July, 1992.

24. From November 11, 1991, until June 28, 1992, Price was on maternity leave. Beginning June 29, 1992, until July 10, 1992, Price was on plant shut down vacation. On July 11, 1992, Price returned from maternity leave, Price was absent from work on July 30, August 11, August 24, August 25, September 11, November 9, November 16, 1992, January 11, 1993, February 1, April 13, and April 14. From September 16 through 21, Price took a personal leave, unrelated to her seizure disorder. Price took leaves of absence, presumably because of the seizure disorder, from October 6 through October 27 and from November 30, 1992 through January 4, 1993. Layoffs also occurred October 1,

2, November 23-27, December 28-January 5, January 20-29, February 15-26 and March 22-26.

25. Some of the absences during the nine months prior to her termination were for reasons unrelated to her epilepsy. For instance, Price admitted during the twelve-month period prior to her termination, she had to miss work at least two times to take care of her baby. Price also had to take off work to attend a relative's funeral out of state.

26. By September 15, 1992, Price's absentee rate once again exceeded the three percent limit. As a result, a verbal warning was given to Price regarding her excessive absenteeism.

27. When Price's absence rate did not decline and Price missed an additional day of work, instead of progressing Price to the next level of the disciplinary procedure which would have been termination because of previous disciplinary actions, Evans gave her another verbal warning on or about November 17, 1992. The Corrective Action Form appears to be misdated. Apparently, the warning should have been dated November 17, 1992, rather than October 17, 1992.

28. After Price missed another day of work, Evans issued a written warning on or about January 12, 1993, after Price's absentee rate went from 3.7% to 4.6%.

29. Another written warning was issued to Price on or about March 1, 1993, specifically warning her that she would be terminated if her absenteeism rate did not

fall below three percent after Price was absent from work another day. When Evans gave Price the written warning, he told Price that if she missed anymore days she needed to talk to him about getting on a leave of absence so that she would not be terminated. Price understood what Evans told her, understood that she would be terminated if her absenteeism did not fall below three percent and understood that her absence rate should decrease steadily.

30. On April 13 and 14, 1993, Price was absent from work for reasons unrelated to her disability. Her problems were her stomach consisting of vomiting, stomach cramps, nausea, and diarrhea.

31. She did not call in April 13 or 14, 1993, and when she learned from a friend that there was a 2-day layoff on her line, she just stayed home and returned to work on Monday, April 19, 1993.<sup>1</sup>

32. Price contends that when she provided Evans with evidence of medical care and doctor's appointment for April 13 and 14, 1993, Evans stated that it didn't do any good now bringing one in because Price had missed those days instead of calling in.

33. As a result of her consistent failure to attend work and the fact that her absentee rate exceeded three percent and was climbing, on April 19, 1993, Price was terminated.

---

<sup>1</sup>It is not clear what happened that Wednesday, whether she was still ill or she learned of the lay-off, but she did not work that week.

34. The decision to terminate Price was made by Evans after meeting with human resource personnel and the operation manager for Skil. The fact that Price had epilepsy was not discussed during the decision making process.

35. No one at Skil had ever indicated to Price that she was a danger to herself or others in her job because of her epilepsy or that was the reason she was being terminated.

36. Attendance at work is crucial in order to adequately staff the production line. Approximately five to twenty employees may work on a particular line. Each person on the line "mans" a work station. Each employee is given certain duties to perform on the line. For example, one employee may place a piece on the tool and another employee may screw the piece into place. If an employee is absent from the line, his or her duties in creating the finished produce cannot be performed.

37. When Skil does not have advance notice of the absence, Skil must find a replacement to take over the absent employee's ordinary job or must divide up the tasks among others on the line. When Skil knows ahead of time that a particular employee will be absent it will usually find a person from another department to fill the absent person's place. However, that replacement person is unable to perform his or her regular duties. AT the time of Price's employment, when Skil knew that an employee would be gone for at least a week, for instance for a leave of absence, it would often recall a former employee from

the recall list to fill in for the absent employee.

38. When an employee is absent from work, his or her absence creates a burden on other employees and Skil. Other employees have to perform tasks they do not normally perform. When an employee is unexpectedly absent from work without notice, an even greater burden is placed upon Skil because it is not able to plan ahead and make arrangements for other employees to take over the job duties of the absent employee. Skil must have a certain number of people to get a certain number of tools out. When several employees miss work, Skil sometimes must accrue overtime to get the work done. Additionally, the production output of Skil is lowered as a result of the absences.

39. The absences of Price created a significant burden on Skil. When Skil was given notice ahead of time of Price's absence, such as for a leave, a burden was placed on Skil because it had to get someone to perform the duties normally performed by Price. However, what made Price's absences especially burdensome was the fact that they were sporadic and without notice. This created an even greater burden on Skil because it was not able to plan ahead and have a replacement ready for Price during her absence.

40. An essential function of Price's job was that she be at work regularly.

41. Price failed to attend work regularly. She had twelve absences for the last twelve months she was employed including the absences on April 13 and 14, 1993.

42. Price claims that she was terminated because "she missed a lot of days and most of it had to do with my seizures." Although she relates her increase in seizures during her last two years of employment as due to pressure put on her by Skil in performing her work, she does not contend that the pressure put on her was because of her epilepsy.

43. The Corrective Action Forms of September 15, 1992, October 17, 1992, and January 12, 1993, were not given to Price because she had epilepsy.

44. Price never asked her supervisors for an accommodation or a change about being off work at any time during her employment or indicate that the attendance policy should not apply to her like it did to others.

45. Price has not specified, much less shown, what changes or accommodations could have been given to Price that would have allowed her to perform her job.

46. Betty Brandon received a verbal warning on July 9, 1993, when her absence rate was 3.9%. She also received a written warning on August 4, 1993, which stated that "if she misses anymore and her rate rises, it could be cause for recommendation of discharge." Brandon's absence rate was 4.2% at the time of the written warning. Two days later, Brandon quit. As reflected in the Termination of Employment document, Brandon had an absentee problem and was facing termination. Had Brandon remained employed and had her absence rate not improved, she would have been terminated.

47. Vicki Collins was given a verbal warning as the result of her absence rate being 6.6%. Collins subsequently decreased her absence rate. When Collins' absence rate rose against to 5.0%, Skil gave her a written warning on December 11, 1992. Collins quit on January 22, 1993. Had Collins remained employed and had her absence rate not improved, she would have been terminated.

48. Brandon and Collins are the only two persons identified by Price as having similar attendance problems, but were not terminated. However, she could not identify anybody who missed work more than she did with absences that counted toward the 3% who was allowed to stay at work and not be terminated.

49. Price has been unable to work since approximately November 30, 1994, and would not have been able to work even if she still worked for Skil.

Plaintiff claims she was terminated because of her epilepsy and the need to make reasonable accommodations to her possible future physical impairments in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* For purposes of the summary judgment motion, defendant has assumed that plaintiff is disabled within the meaning of the ADA.

The ADA prohibits discrimination against "qualified individuals with disabilities." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is defined at 42 U.S.C. § 12111(8) as:

An individual with a disability who, with or without "reasonable accommodation," can perform the "essential functions" of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of the job are essential, and if an employer has prepared a written description for advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

The parties agree that the analysis of plaintiff's claim is governed by McDonnell Douglas v. Green, 411 U.S. 792 (1973) and St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993). By a preponderance of the evidence, plaintiff must prove that she belonged to a protected class, that she was qualified for the job, that she suffered an adverse employment action, and that she was treated differently from similarly situated employees.

Since it is undisputed that plaintiff can perform her job on the line, the only issue is attendance. By affidavits and the attendance policy, defendant has established that good attendance is an essential function of plaintiff's job. Plaintiff did not ask for any accommodation as to her absences related to her epilepsy and did not identify what reasonable accommodation could have been made by defendant given the nature of plaintiff's duties on the production

line. Her termination followed an absence that was not related to her epilepsy. In addition, plaintiff's examples of Brandon and Collins do not demonstrate that they were treated differently than her. the uncontroverted evidence is that they were being progressively disciplined the same as plaintiff, but they quit before the next step of termination. Thus, plaintiff has failed to establish a prima facie case of discrimination under the ADA.

Even if the Court were to assume that plaintiff had made a prima facie case, defendant has met its burden of production by providing evidence to sustain a judgment in its favor. Plaintiff has not established the existence of facts which would permit a jury to conclude that defendant's proffered reason was pretextual or that intentional discrimination was the true reason for defendant's actions. See, Krenik v. County of Le Sueur, \_\_\_\_ F.3d \_\_\_\_, 1995 WL 54783 (8th Cir. 1995). Therefore, defendant is entitled to summary judgment.

Accordingly, defendant's March 13th motion for summary judgment is granted. Plaintiff's March 30th motion in limine is moot.

IT IS SO ORDERED this 31st day of March, 1995.

s/ George Howard, Jr.  
UNITED STATES DISTRICT JUDGE

**APPENDIX D - JUDGMENT OF THE  
UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
DATED AND FILED MARCH 31, 1995**

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
JONESBORO DIVISION

LAURINA PRICE PLAINTIFF

v.Civil No. J-C-94-190

S-B POWER TOOL DEFENDANT

JUDGMENT

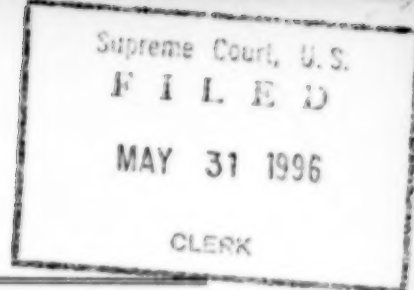
In accordance with the separate order filed this date granting defendant's motion for summary judgment, judgment is entered in favor of defendant and against plaintiff.

DATED this 31st day of March, 1995.

s/ George Howard, Jr.  
UNITED STATES DISTRICT JUDGE

(2)

No. 95-1782



**In The  
Supreme Court of the United States  
October Term, 1995**

LAURINA PRICE,

*Petitioner,*

vs.

S-B POWER TOOL, also known as  
Skil Corporation, a division  
of Emerson Electric Company,

*Respondents.*

**Response to Petition for Writ of Certiorari  
To The United States Court of Appeals  
For The Eighth Circuit**

**RESPONSE TO PETITION FOR WRIT OF CERTIORARI**

RUSSELL GUNTER  
McGLINCHEY STAFFORD LANG,  
A Professional Limited Liability Company  
P. O. Box 3178  
Little Rock, Arkansas 72203  
TEL: 501-371-9999  
FAX: 501-371-0035  
*Counsel for Respondents*

i.

**QUESTION PRESENTED FOR REVIEW**

Petitioner challenges the findings of fact by the District Court and the Eighth Circuit Court of Appeals in which both Courts held that based on the undisputed evidence, an employee failed to establish a prima facie case of discrimination under the Americans With Disabilities Act, and that even if the employee made out a prima facie case, the employee failed to present any evidence that the employer's stated reason for discharge (excessive absenteeism) was a pretext for discrimination.

ii.

**LIST OF PARENT COMPANIES AND  
NON-WHOLLY OWNED SUBSIDIARIES**

S-B Power Tool is jointly owned by Emerson Co. and Robert Bosch Company. There are no non-wholly owned subsidiaries of S-B Power Tool.

iii.

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No. 95-1782

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In The  
**Supreme Court of the United States**  
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LAURINA PRICE,

*Petitioner,*

vs.

S-B POWER TOOL, also known as  
Skil Corporation, a division  
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*Respondents.*

---

**Response to Petition for Writ of Certiorari  
To The United States Court of Appeals  
For The Eighth Circuit**

---

**RESPONSE TO PETITION FOR WRIT OF CERTIORARI**

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Respondent, S-B Power Tool prays that this Court deny the Petition for Writ for Certiorari to the United States Court of Appeals for the Eighth Circuit on the question presented.

### I. STATEMENT OF STATUTE INVOLVED

The question for review involves the Americans With Disabilities Act, 42 U.S.C. Section 12101 et seq., which, inter alia, prohibits discrimination against qualified individuals with a disability who can perform the essential functions of a job, with or without a reasonable accommodation.

### II. STATEMENT OF THE CASE

Petitioner was discharged from her job on an assembly line because of her excessive absenteeism. Regular and predictable attendance at work was an essential function of Petitioner's job which Petitioner was unable to perform, with or without a reasonable accommodation. The District Court and the Eighth Circuit Court of Appeals both held that Petitioner could not make a prima facie case of discrimination under these circumstances, and that even if a prima facie case of discrimination had been made out, Petitioner did not present any evidence of pretext sufficient to allow a jury to infer that the stated reason for discharge (excessive absenteeism) was a mere pretext for discrimination against Petitioner on the basis of her disability.

### III. STATEMENT OF DISPUTED FACTS

At page 5 of Petitioner's Petition for Writ of Certiorari, under the heading of Statement of the Case, the

Petitioner makes the following statement: "Defendant had made accommodations for Price for the first six (6) years of Price's employment by occasionally giving Price either verbal or written warnings, but never terminating Price, even though her absentee rate rose over 3%." Respondent denies that Price was treated any differently regarding her absenteeism earlier in her career. Indeed, when Petitioner's attendance rate exceeded 3%, she was given verbal and written warnings that if her attendance did not improve, she would be discharged. When her attendance did in fact improve, she was not discharged. Later in her career, when her attendance again exceeded 3%, she was again given verbal and written warnings that if her attendance did not improve, she would be discharged. When her attendance did not improve, she was discharged. Petitioner then alleges that the difference in the two situations was "an apparent change in policy ... directed toward Price" as a result in a change in ownership. In fact, Respondent's policy directed toward Price was the same in both situations: If Petitioner's attendance did not improve, she would be discharged. The difference in the two situations was not in Respondent's behavior, but rather in Petitioner's behavior. In the first situation, Petitioner improved her attendance and she was not discharged. In the second

situation, Petitioner did not improve her attendance and she was discharged.

#### IV. REASONS FOR DENYING WRIT

Rule 10 of the Supreme Court Rules sets forth the criteria this Court normally uses in deciding whether to grant a Writ of Certiorari. Specifically, Rule 10 states that "A petition for a writ of certiorari is rarely granted when the error asserted consists of erroneous findings of fact ..."

Petitioner's alleged error herein is that the lower courts findings of fact with regard to the establishment of a prima facie case and with regard to pretext are in error. For this reason alone, this Court should deny Petitioner's Writ of Certiorari.

Even a cursory review of the facts in this case make it clear that this is not one of the rare cases on which the petition should be granted based on erroneous findings of fact.

After making extensive findings of fact based on the record before it, the District Court held:

Since it is undisputed that plaintiff can perform her job on the line, the only issue is attendance. By affidavits and the attendance policy, defendant has established that good attendance is an essential function of plaintiff's job. Plaintiff did not ask for any accommodation as to her absences related to her epilepsy and did not identify what reasonable

accommodation could have been made by defendant given the nature of plaintiff's duties on the production line. Her termination followed an absence that was not related to her epilepsy. In addition, plaintiff's examples of Brandon and Collins do not demonstrate that they were treated differently than her. The uncontroverted evidence is that they were being progressively disciplined the same as plaintiff, but they quit before the next step of termination. Thus, plaintiff has failed to establish a prima facie case of discrimination under the ADA.

Even if the Court were to assume that plaintiff had made a prima facie case, defendant has met its burden of production by providing evidence to sustain a judgment in its favor. Plaintiff has not established the existence of facts which would permit a jury to conclude that defendant's proffered reason was pretextual or that intentional discrimination was the true reason for defendant's actions.

In reviewing the District Court's decision, the Eighth Circuit Court of Appeals addressed Petitioner's claims that the District Court erred:

Price did not meet her burden of establishing a prima facie case because the record does not show that Price's termination occurred under circumstances that would permit an inference of discrimination. Price has not presented any facts tending to suggest that she was terminated because of her disability. She asserts that she was treated differently from other similarly situated nondisabled employees, but her claim is not supported by her own evidence. She identifies two non-disabled employees with similar attendance

problems, but does not show that they were treated any differently. Both had received oral and written warnings in response to their attendance rates rising above three percent. Neither was actually terminated, but that was because both quit voluntarily soon after receiving the written warning.

The evidence in the record, when viewed in a light most favorable to Price, shows only that she was terminated for being absent from work on April 12 and 13 without calling to arrange for leave time after being instructed specifically to do so. Her absences on those days were not related to her epilepsy, and she does not claim that her epilepsy prevented her from calling in to make arrangements for leave time. Her supervisor had warned her in March that she must call in to arrange for leave time if she was going to be absent for any reason. The record is insufficient to create a prima facie case of discrimination.

Summary judgment would have been appropriate even if Price had established a prima facie case of discrimination because Skil offered a legitimate nondiscriminatory reason for her dismissal and Price failed to come forward with any evidence of pretext.

Even if Petitioner were not asserting that the lower courts' findings of fact were erroneous, this Court should not grant the Petition for Writ of Certiorari because the court's that have addressed the issue of attendance as an essential function of a job have spoken in rare unity.

Reporting for work is perhaps the most fundamental requirement for almost every job, regardless of the type of work performed. As aptly stated by the court in Matzo v. Postmaster General, 685 F. Supp. 260, 263 (D.D.C. 1987), aff'd, 821 F.2d 1290 (D.C. Cir. 1988), "[a] minimal and basic qualification for any job . . . is the ability to report for work and remain on duty for the duration of the workday." The EEOC has likewise recognized the legitimacy of maintaining attendance control programs. "Leave policies . . . that are uniformly applied do not violate this part simply because they do not address the special needs of every individual with a disability." 29 C.F.R. § 1630.5. Even legitimate policies, such as attendance, which may have a disparate impact on persons with a disability are not subject to challenge. 29 C.F.R. § 1630.15(b) and (c).

Courts have uniformly recognized that an essential part of any job is the requirement of reasonably regular and predictable attendance; thus, an employee who cannot meet the attendance requirements of the job at issue cannot be considered a "qualified" individual protected by the ADA. See Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994) (summary judgment granted where employee "could not perform the 'essential function' of coming to work regularly"); Tyndall v. National Education Centers, 31 F.3d at 213

(regardless of the fact that teacher performed well when she did come to work, frequent absences rendered her unable to function effectively; thus, summary judgment granted); Jackson v. VA, 22 F.3d 277, 279 (11th Cir. 1994), cert. denied, 115 S.Ct. 657 (1994) (summary judgment granted where janitor who was frequently absent from work failed to prove he was qualified and that he met the essential function of his employment, that of being present); Law v. United States Postal Serv., 852 F.2d 1278, 1279-80 (Fed. Cir. 1988) (agency is inherently entitled to require an employee to be present during scheduled work hours); Misek-Falkoff v. IBM Corp., 854 F. Supp. 215, 227 (S.D.N.Y. 1994) (motion to dismiss granted where court recognized employer may certainly require an employee's presence at the workplace when the presence is essential to the task to be performed); Walders v. Garrett, 765 F. Supp. 303, 310 (E.D. Va. 1991), aff'd, 956 F.2d 1163 (4th Cir. 1992) (summary judgment granted where court recognized that "some degree of regular, predictable attendance is fundamental to most jobs"); Santiago v. Temple Univ., 739 F. Supp. 974, 979 (E.D. Pa. 1990), aff'd, 928 F.2d 396 (3d Cir. 1991) (an employee of any status, full or part time, cannot be qualified for his position if he is unable to attend the workplace to perform the required duties with any degree of predictability because

attendance is necessarily the fundamental prerequisite to job qualification); Lemere v. Burnley, 683 F. Supp. 275, 280 (D.D.C. 1988) (alcoholic employee was not qualified as result of pattern of unscheduled absences which "prevented her from following a regular work schedule under which she could 'perform the essential functions' of her position"); Wimbley v. Bolger, 642 F. Supp. 481, 485 (W.D. Tenn. 1986), aff'd, 831 F.2d 298 (6th Cir. 1987) (an employee "who does not come to work cannot perform any of his job functions, essential or otherwise"); Stevens v. Stubbs, 576 F. Supp. 1409, 1415 (N.D. Ga. 1983) (summary judgment granted because law does not protect absenteeism).

In the face of the numerous decisions supporting Respondent's argument that summary judgment was appropriate because Price could not perform the essential functions of her job as the result of her frequent and sporadic attendance, Petitioner merely cites EEOC v. AIC Security, 820 F. Supp. 1060 (N.D. Ill. 1993). However, AIC Security is distinguishable from the facts at hand. First, in AIC Security, the plaintiff's supervisor claimed that the plaintiff's disability did not affect the number of hours he worked. In contrast, it is uncontroverted that Petitioner's disability affected the number of hours she worked. Second, the plaintiff in AIC Security was never warned that his

attendance was unsatisfactory. Petitioner herein concedes that she was warned many times about her unsatisfactory attendance. Third, the plaintiff in AIC Security could perform many of the essential functions of his job at home. For instance, he could perform many of his duties by phone because whether he phoned from home or the office was not material. In this case, Petitioner could not perform any of the essential functions of her position, assembler on a factory assembly line, at home. Thus, unlike the situation in AIC Securities, the lower court's herein have properly ruled that attendance was an essential function of Petitioner's job, and as every court that has considered the matter, the lower court's properly held that Petitioner's attendance problems were not protected by the Americans With Disabilities Act.

### V. CONCLUSION

The Courts below properly found that based on all the evidence viewed in the light most favorable to Petitioner, Petitioner failed to make out a prima facie case of discrimination, and failed to present evidence that Respondent's stated reason for discharge (excessive absenteeism) was a mere pretext to discriminate against Petitioner because of her disability. This case presents no

novel issues of law or fact, and this Court should deny the Petition for Writ of Certiorari herein.

Respectfully submitted,

McGLINCHEY STAFFORD LANG,  
A Professional Limited Liability Company

Russell Gunter  
P. O. Box 3178  
425 W. Capitol Ave., Suite 3900  
Little Rock, Arkansas 72203  
TEL: 501-371-9999  
FAX: 501-371-0035  
*Counsel for Respondent*